## QUESTIONS PRESENTED

1. Whether evidence that a witness had identified petitioner at a police station shortly after petitioner's arrest was properly admitted where the witness stated in court that he was not sure that petitioner was the person who had attempted to pass a counterfeit bill to him.

2. Whether the evidence was sufficient to support the verdict.

## STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York of uttering a forged ten dollar bill and concealing two such bills, in violation of 18 U.S.C. 472. He was sentenced to imprisonment for ninety days, and placed on probation for two years (R. 256).

The evidence showed that petitioner passed a counterfeit ten dollar bill at a bar in Port Chester, New York on April 4, 1965. When the owner of the bar found the number on a list of counterfeits, he signaled his brother, an off-duty policeman, who was in the bar at the time, and petitioner was subsequently arrested (R. 18-21, 33-37). At the police station, another forged bill was found in petitioner's right shoe (R. 41-42, 76-79).

Another bar owner, Mr. Keys, testified that on April 3 (the day before the offense charged) a man tried to pay for a drink with a counterfeit ten dollar bill, which Mr. Keys "threw" back (R. 101). When asked if the man was present in court, Mr. Keys

answered, "I'm not sure" (R. 103). Mr. Keys testified that on April 4 at the police station he had identified the man who attempted to pass the bill to him; but when asked if the man was in the courtroom, again he said, "I'm not sure." (R. 103-105). Petitioner moved to strike the testimony of the witness, and the government stated that it proposed to call a policeman to show that the witness had identified petitioner (R. 110). When petitioner's counsel objected, government counsel said he saw nothing objectionable and the court said, "I don't either" (R. 111). The policeman who had arrested petitioner then testified that on April 4 Mr. Keys, looking through a two-way mirror glass, had identified petitioner as the man who tried to pass the counterfeit bill in his bar (R. 112). The jury during their deliberations called for the testimony of Keys and the policeman (R. 244).

In affirming the conviction, the court of appeals ruled that it did not have to reach the question of the admissibility of the officer's testimony relating to the identification of petitioner by Keys, since petitioner's counsel had made only a general objection to such testimony and had not specified the grounds therefor, although both government counsel and the court had indicated that they did not understand the basis of the objection (Pet. App. 15-20).

## ARGUMENT

1. As the court below noted, petitioner did not specify the basis of his objection to the policeman's

testimony of prior identification, although both government counsel and the court indicated that they did not understand the basis thereof. Under the circumstances, his general objection was not sufficient to preserve the issue on appeal. See *On Lee* v. *United States*, 343 U.S. 747, 749-750, n. 3; *Stewart* v. *United States*, 131 F.2d 624 (C.A. 5). In any event, the evidence was properly admitted. The question at issue is not the general one petitioner argues—the admissibility of a witness' prior unsworn inconsistent statement. Prior identification of the kind involved here is not a statement but an act of recognition, and it therefore has been held not to come within the rationale of the hearsay rule. See *Johnson* v. *State*, 254 Wisc. 320, 326. The policeman was fully competent to testify to Mr. Keys' act in identifying petitioner—to what he did, in other words, rather than just to what he said.

Moreover, it is generally recognized that a prior identification has greater probative value than a prior unsworn statement. While there are conflicting decisions on this point,[1] the view favored by text writers and a number of decisions would permit such evidence on the theory that a prior identification, being closer in point of time to the events at issue, is more apt to import verity than identification in a courtroom at a later trial. See 4 Wigmore, *Evidence*, § 1130.

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[1] The cases are collected in a lengthy annotation in 71 A.L.R. 2d 449.

Furthermore, the prior-identification testimony here was neither in direct contradiction to, nor in rehabilitation of, the testimony of the witness at the trial; it was complementary to such testimony. Mr. Keys was not sure that petitioner was the man with whom he had dealt and had identified the day after; but neither did he deny that petitioner was the person. The policeman's testimony that Mr. Keys had identified petitioner as the person with whom he had dealt the day before was a factor that the jury was fully entitled to consider in connection with the testimony of the witness who was present and was subject to cross examination. Most of the decisions have deemed evidence of prior identification admissible in these circumstances. See *R.* v. *Burke*, 2 Cox Cr. 295; *State* v. *Wilson*, 38 Wash. 2d 593, certiorari denied, 342 U.S. 855; *People* v. *Gould*, 54 Cal. 2d 621, 626. Cf. *United States* v. *De Sisto*, 329 F.2d 929 (C.A. 2), certiorari denied, 377 U.S. 979.[2]

2. The challenge to the sufficiency of the evidence is without merit. The finding of the second counterfeit bill in petitioner's shoe while good currency was in his pocket was in itself sufficient to justify an inference that he knew the bill was counterfeit. The circumstances testified to by Mr. Keys and the policeman provided additional support for that inference.

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[2] Some decisions have held such evidence admissible only to neutralize the adverse effect of the failure to identify. *State* v. *Kysilka*, 84 N.J.L. 6.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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* In lieu of the Solicitor General who has disqualified himself for personal reasons.

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